

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PABST BREWING COMPANY,
a Corporation,
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY,
a Corporation,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

DEVLIN & DEVLIN,
W. H. CARLIN,
MAURICE E. HARRISON,
Attorneys for Defendant in Error.

Filed this.....*day of November, 1915.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

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No. 2639.

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BRIEF OF DEFENDANT IN ERROR.

Plaintiff Below.

This is an action to recover damages for a breach of contract. For convenience we shall call the plaintiff in error (defendant below) the "Pabst Company", and the defendant in error (plaintiff below) the "Horst Company".

The Horst Company, whose principal place of business is in California, is a grower of hops. The Pabst Company is a brewing company whose place of business is in Milwaukee, Wisconsin.

The Horst Company sold the Pabst Company at an agreed price a certain quantity of choice air dried Cosummes hops. The original contract did not require samples to be submitted. Samples were in fact submitted. Horst Company submitted to defendant certain samples of hops of which it tendered de-

livery. Pabst Company refused to accept on the ground that they were not of the quality required by the contract. Pabst Company refused to accept samples submitted by Horst Company, and broke the contract. The telegram from Pabst Company breaking the contract is dated November 4, 1912, and is as follows:

E. Clemens Horst Co.,
San Francisco.

Cannot accept samples as they are not according to choice quality specified in contract. We herewith cancel contract for two thousand bales entered into with you because of your inability to comply with specifications.

PABST BRG. CO.

(Trans. pp. 57-58.)

To this the Horst Company replied:

Pabst Brewing Co.,
Milwaukee, Wis.

Replying to your yesterday's wire received today we disagree with your comments on quality of samples sent you and to your statement that we are unable to comply with our contracts with you. Please wire us in what respects you claim samples twenty-five to thirty-eight inclusive to be below contracted quality and whether you claim none of all samples sent you is equal contracted quality. Please also wire whether you will pay us decline in market if we consent cancellation two thousand bale sale we cannot release contracts without proper settlement. We suggest that our letter October eighteenth offers fairest method of adjusting matter. We are willing submit further samples and are willing that Chief Inspector of San Francisco Chamber of Commerce or other high class competent dis-

interested parties to be agreed upon shall pass upon quality.

E. CLEMENS HORST CO.

(Trans. page 587.)

Finally Pabst Company refused to have further discussion with Horst Company, and told it to take such action as it deemed proper, by a telegram dated November 7, 1912, as follows:

E. Clemens Horst Co.,

San Francisco.

Samples we sent you represent choice quality cosummes which our contract specifies and to which none of your samples compare period our judgment and experience sufficient to warrant our action in cancelling contract because of insufficient quality samples submitted by you period have partially covered quality at higher than our contract price with you because of our rejection therefore will not entertain suggestion to pay you difference period will not have further discussion on this and if you consider our action arbitrary take such action as you may deem best for your interest.

PABST BRG. CO.

(Trans. page 59.)

The counsel for defendant below admitted that it cancelled the contract and repudiated it November 4, 1912. (Trans. page 181.)

All the samples—both those tendered by Horst Company to Pabst Company, and those submitted by Pabst Company to Horst Company—were in court, and submitted to the jury for inspection.

Experts were also called by both parties as to the qualities of the hops, and, as sometimes happens,

the experts disagreed, one set claiming that the samples were of the kind called for by the contract, and the other asserting the contrary.

The jury returned a verdict in favor of the Horst Company.

The Court in instructing the jury stated the issues submitted to them for consideration and no better statement of the issues in the case can be made than that made by the trial judge. For the purpose of showing the issues which the jury were to try and determine, and the law applicable to them, we subjoin the instructions given by the trial judge.

CHARGE TO THE JURY.

THE COURT (orally): Gentlemen of the Jury, I ask your attention at this time for a few moments while I submit to you the principles of law that must govern you in your consideration of the evidence in this case for the purpose of arriving at a verdict. The action is one for the alleged breach of a contract for the sale of hops. While the cause has consumed some considerable period of time and has involved the taking of a large volume of evidence, I think that you will find when you come to consider it in the light of the instructions of the Court that it lies within rather narrow lines, and that you will have no difficulty in readily perceiving what the salient features of the case are that will call for your consideration. The Court will tell you what the legal effect of the correspondence between the parties is, and from that and the oral evidence that has been placed before you you will determine what the facts are which I shall indicate to you it is essential for you to find in order to reach a verdict; and with that view I shall now state to you the more specific principles that

will actuate you in your consideration of the evidence.

The telegraphic offers by the plaintiff and their acceptance by the defendant in August, 1911, as shown by the evidence, constituted in law a valid and binding contract as of that date, whereby the plaintiff obligated itself to sell and deliver and the defendant to accept and pay for two thousand bales of choice, air-dried Cosumnes hops of the crop of 1912, at the price of twenty cents a pound delivered on board the cars at Milwaukee, Wisconsin, plus freight, that is, freight to be paid by defendant in addition to the purchase price named; and this contract was in no respect modified or changed by the subsequent correspondence or negotiations of the parties. While this contract did not by its terms require plaintiff to submit samples of hops prior to delivery, the evidence shows without a conflict that the parties by their acts so construed it, and it hereby became one of the terms of the contract by which they were bound.

Under this contract, therefore, it was the duty of the plaintiff within a reasonable time after the harvesting of the crop of 1912 to submit to the defendant samples of hops of the quality specified in the contract and hold himself ready to deliver the quantity called for by the contract in due course, and it was the reciprocal duty of the defendant upon receipt of such samples, if of the quality specified, to accept delivery of the quantity named in the contract and pay for them in accordance with its terms.

The evidence shows without controversy that plaintiff did in due time upon the harvesting of the crop of 1912 submit to the defendant samples of hops of that season's growth which he claimed and still claims represented hops of the character in all respects as called for by the contract, and represented himself as ready to deliver the quantity therein specified to the defendant. The

samples thus submitted were each and all rejected by the defendant as not representing the quality which it was entitled to demand under the contract, and thereafter, on November 4, 1912, defendant notified plaintiff by a telegram that it cancelled the contract, and refused to accept delivery of the hops tendered by plaintiff as not being of the grade or quality called for.

The first question, therefore, which you are called upon to determine in reaching a verdict is whether the samples thus submitted by plaintiff were of hops of the quality specified in the contract, since this is a question for the jury to determine and not one for the final decision of the defendant. If they were of that quality, and plaintiff was ready and able to deliver the quantity called for in accordance with the terms of the contract, the defendant could not arbitrarily repudiate the contract by claiming that the samples were not in accordance with the quality of hops stipulated. If, however, none of the samples submitted by plaintiff represented the character of hops called for by the contract, but were of an inferior grade, and plaintiff was unable to furnish samples of the required quality within the time given for delivery, then the defendant had a right to reject them and to say that it would not receive hops of that character. To be more specific, if of the first lot of samples shown to have been submitted by plaintiff to defendant there were some that answered to the contract quality, it was the duty of the defendant to accept such samples as represented the required quality and give the plaintiff an opportunity to make delivery of the hops contracted for in accordance therewith; and in such case the defendant, by rejecting them all and refusing to receive the delivery, was in default and guilty of a breach of the contract. And although none of the twenty samples first submitted were of the contract quality, nevertheless if those subse-

quently submitted by the plaintiff, or some of them, were of the contract quality, it was likewise the duty of the defendant to have accepted such as were of that quality, and to have given the plaintiff the opportunity to deliver hops equal in quality to such samples; and if in such case the defendant rejected them all without giving plaintiff the opportunity to deliver hops equal in quality to those that were up to the contract, then the defendant was in default and guilty of a breach. Again, if you find that both lots of samples submitted failed to come up to the contract quality, but find that under the contract the plaintiff had time after November 4, 1912, in which to make delivery, the defendant could not by attempting to cancel the contract on that date lawfully preclude the plaintiff from thereafter delivering hops of the contract quality within the time given for such delivery.

Some question has been made by the defendant in its evidence as to the sufficiency in number and size of the samples submitted by the plaintiff to fairly enable the quality of the hops to be properly passed on. In that regard, as it does not appear that the defendant ever made any objection to the plaintiff on that score, and the latter was left to assume that the samples sent were sufficient in number and size for the purpose for which they are sent, it is now too late for defendant to take advantage of that objection, even if well-founded.

Where the article sold is in its nature not entirely uniform in quality, a sample represents the character of a larger mass only approximately, and if the jury find that hops are in their nature not of an entirely uniform quality, and also find that as a matter of custom in the hop trade a sample is regarded as representing the average quality of an entire lot, then the defendant has his full rights if he obtains or may obtain in the entire quantity to be delivered the

aggregate or average of quality indicated by the sample. The fact that a number of samples was submitted does not necessarily imply an understanding that each bale of hops shall be equal to the same sample, or that a comparison is to be made separately with each bale of hops. What is a proper mode of applying the standard of quality is a question of fact which you are to decide from all the evidence in the case.

From what I have said you will understand that if the samples submitted by plaintiff did, as indicated, fairly represent the quality of hops called for in the contract, and that plaintiff was ready and able to deliver the required quantity within the time allowed him for the purpose, then defendant was not justified in attempting to cancel or repudiate its obligation to receive them, and the plaintiff will be entitled to recover the damages suffered by it through defendant's refusal to accept and pay for them. And whether plaintiff had the full quantity on hand or not would make no difference in that respect if he could have procured them in time to make delivery within the terms of the contract; and with reference to the time within which such delivery was to be made, I shall hereafter more fully instruct you.

If at the time of the receipt of defendant's telegram announcing that it cancelled the contract, plaintiff was ready and able, as I have indicated, to comply with its terms, he was entitled to treat this refusal as a complete breach which gave him the right, without further tender, to immediately commence an action for damages. The rule of damages for a breach of contract by a renunciation of it before the day of performance arrives is the amount that the injured party suffers by the continued breach down to the time performance is due, less any abatement by reason of steps by the injured party to protect himself which the law required him to take. That is,

if you find that the defendant was not justified in refusing to accept the hops in question, the plaintiff is entitled to such damages as will justly represent the amount of its loss between the date of the repudiation of the contract and the time at which it had to make complete delivery of the hops, less the amount he could save by a reasonably prompt disposition of the hops to others at the best price to be obtained, as hereinafter stated, such damages not to exceed the amount demanded in the complete,—which, I believe, is \$32,000.

Where a contract is made, as in the present instance, for the future delivery of a commodity not yet grown or produced, and no time is specified for delivery, the law implies ordinarily that delivery shall be made within a reasonable time after the commodity has been prepared for market. In this case, however, evidence has been introduced tending to show that there in the sale of hops of a crop to be grown no precise time is specified for delivery, it is understood by those dealing in the commodity that the seller or shipper has until the end of the shipping season in which to make delivery, and that this season extends from the time of picking or harvesting to the first of March of the following year. If you find that such a custom or trade usage existed and was known to the parties when the contract was made, then, the contract being silent as to the date of delivery, plaintiff had until the end of such shipping season to deliver the hops specified in the contract. If the hops tendered by plaintiff were of the quality specified in the contract and defendant consequently not justified in refusing their delivery, plaintiff was not required to make further tender of them, but if it had such hops on hand it could proceed to sell them at the best market price obtainable at the time and place of delivery; if there was no market price at the time and place of delivery then

at the market price at the nearest market for such commodity, or if there was no existing market price then at the best price obtainable; and if this was less than the contract price plaintiff is entitled to recover the difference between that price and the amount realized by the sale, plus any expenses reasonably incurred by plaintiff in excess of what it would have cost plaintiff to deliver the hops to defendant had the contract been completely performed. It is for the jury to decide what expenses, if any, thus claimed are, under the circumstances, justly and reasonably incurred. When in this case, as I have indicated, plaintiff was required under the law, upon a repudiation of the contract by the defendant, to proceed with due diligence and expedition to dispose of the hops to the best advantage it could and thus reduce the damages resulting through defendant's breach, if you find there was a breach, he was only entitled to incur such expense in that regard as an ordinarily prudent man would have incurred, such as for brokerage, insurance, storage, cartage, and the like incidents. The mere fact that plaintiff may have paid out certain expenses in reselling the hops is not in itself sufficient to entitle him to recover the expenditures against the defendant unless the jury find that it was a reasonably just and proper one which a man of ordinary business prudence would have considered necessary to incur for the purpose.

In this connection, evidence has been introduced tending to show that the plaintiff after it received notice from the defendant that the latter cancelled the contract began to sell the hops to others. If you find that at the time of the giving of such notice by the defendant to the plaintiff the plaintiff had a sufficient quantity of hops on hand of the quality required by the contract to fill it, and after such notice began to sell such hops to others in the usual and

ordinary manner in which hops are sold, and endeavored to obtain the best prices possible, you have a right to consider the prices obtained by the plaintiff on such resales in connection with the evidence as tending to establish the market prices of such hops at the time of such resales. If a contract for the sale of merchandise has been broken by the buyer, and the seller is compelled to resell at a loss, he is entitled to recover the difference between the contract price and the price that he has realized on a resale, together with his expenses, exclusive of interest, interest on this demand not being claimed.

If the time for delivery extends over a period of time, then for the purpose of fixing damages the market value to be considered is that of the last day of the period within which delivery may be made under the contract.

Should you find that the defendant committed a breach of the contract as alleged, but that at the time the plaintiff did not have the full quantity of hops required to fulfill the contract in his possession or under his control, and thereby was not put to the expense of making a resale of the entire quantity called for by the contract, then the only damages which the plaintiff could recover as to the quantity not on hand would be the loss of profit which it would have made had the defendant completed the contract; and that profit would be the difference between the price at which the plaintiff could then have procured the hops required to fill the contract and the price at which they were contracted to be sold.

Those comprise the specific features of the charge with reference to the claim of the plaintiff.

As to defendant's counter-claim, I advise you, gentlemen of the jury, that there is no sufficient basis in the evidence upon which to rest a verdict for defendant on that demand.

There are certain general considerations

which it is proper for me to submit to you.

As I indicated to you at the opening, the law of the case is to be given to you by the Court, and you are bound by that, and bound to apply it to the evidence in the case in reaching your verdict. The facts, however, rest solely and exclusively within the province of the jury to find, and with that the Court is neither disposed nor permitted to in any wise interfere. We are permitted, within the jurisdiction that this Court exerts, to discuss the evidence with the jury if we see fit, but we are not much in the habit of doing so, because our observation of the intelligence of the class of jurors that we get in the federal courts is such that we do not find it necessary, and it is our habit usually to leave the consideration of the evidence free from any suggestion by the Court as to its views.

Now in passing upon the facts in the case you necessarily pass upon the credibility of the witnesses, because that enters largely into the determination of what the facts are in a case where there is a conflict in the evidence, as has been very fully illustrated in this case. Where there is a conflict in the evidence the jury must solve that by the application of those usual and ordinary principles which I shall state to you in determining the credibility that you will accord to the respective witnesses.

The plaintiff is bound always in a case to sustain the burden of proof upon the affirmative issues that arise out of the pleadings and involving his demand, and in order to recover he must sustain that by what is termed in the law a preponderance of the evidence. Now a preponderance of the evidence simply means that in the judgment of the jury, because they are the tribunal which passes upon that, the evidence on behalf of the plaintiff is in some respects stronger or more persuasive as a basis of their verdict than that presented on behalf of the defendant.

It does not mean that the plaintiff is bound to present a greater number of witnesses than the defendant in favor of his claim, because preponderance does not necessarily depend upon the greater number of witnesses. One or two witnesses, or a document or a presumption, may be of such effect by reason of its relation to the other facts in the case as to satisfy the jury that the truth lies in favor of that side, although a much larger number of witnesses may testify directly and positively to the contrary. So that you see your verdict will rest upon what you deem to be the strength of the evidence, independently of the number of witnesses on either side. You are not, however, to judge of the evidence of the witnesses arbitrarily, but your judgment in that respect is to be exercised with legal discretion and in subordination to the rules of evidence.

In this case, gentlemen of the jury, a very considerable portion of the evidence consists of what is termed, or has been here termed, expert testimony. Now it is proper or it would not be admitted, but you are to understand, gentlemen of the jury, that your good judgment, any more than mine, is not to be swerved from its pedestal by considerations that may be suggested from the witness stand by so-called experts if they do not accord with your reason, based upon all the evidence in the case. The observation of courts in dealing with expert testimony is that almost invariably an expert being produced by one side or another seems unconsciously to deem it his duty to make out a case for the side by which he has been produced. Now that is not in any wise reflecting upon the character of experts,—it is human nature—but it is something that the jury may take into consideration in determining the value that they will ascribe to expert testimony in any case; and in this case you will have a right to apply it in determining the degree of weight

or credibility,—because I assume that all the witnesses who have appeared before you are men of credibility,—that you will attach to that class of evidence.

So with reference to the testimony of any witness in the case, whether expert or other, you pass upon his credibility, and you do that by observing his demeanor and manner upon the stand and his apparent bias or prejudice or interest in the case, whether a pecuniary interest or a friendly one, whether an enmity which grows out of relations with the party or through the circumstances of being a rival in trade,—all those considerations you have a right to take into your judgment in determining the credibility that you will accord to any witness.

A witness is presumed by the law to tell the truth, and the jury, in the absence of anything to indicate that a witness has deviated from the truth, must give him the benefit of that presumption; but that does not mean, of course, that you are to abdicate your reason and judgment in passing upon the credibility of a witness, or that you are bound to believe him, no matter how strongly or positively he may assert a fact, if it is one which does not under all the circumstances accord with your judgment. It is in accordance with these principles that you pass upon the credibility of the witnesses and solve, according to your best judgment, the conflicts that have appeared in various particulars in the testimony in the case, and in this way you make up your minds as to what the facts are.

In this case, as I have perhaps sufficiently indicated to you, the crucial and pivotal question is as to the character of these hops. If the hops which were tendered by the plaintiff were of a character such as would be regarded in the trade as coming substantially within the quality specified in the contract in suit, then the plaintiff is entitled to have the contract enforced by an

award of such damages as you may find, within the principles I have stated, he has suffered. If, on the other hand, the hops, in your judgment, did not comply with the requirements of that contract as to their quality, then he is not entitled to recover, but your verdict in such event would be in favor of the defendant, which would carry defendant's costs.

In the federal courts, gentlemen of the jury, unlike the state system, the verdict of the jury is required to be unanimous. You cannot find a verdict by a less number than the entire twelve, as you may under the present state law.

The clerk has prepared forms of verdict which you will find to meet your necessities in view of the suggestions I have made to you. There is a form here which will enable you by filling in the amount to express your verdict if you determine in favor of the plaintiff. Should your verdict be in favor of the defendant, there is a form which will express that conclusion.
(Pages 367-380.)

There was only one issue in the lower court—that was, was the defendant justified in cancelling its contract?

If it was, plaintiff of course could not recover.

In the brief of plaintiff in error many pages are devoted to arguing the *weight* and *sufficiency* of the evidence, rather than its admissibility. It argues also many questions settled and admitted by the pleadings, and also other matters settled by the Court in its instructions to the jury, to which no exception was taken.

It is elementary that if any evidence at all is

introduced on the issue before the jury which proves a fact in issue, or from which an inference may reasonably be drawn, the question as to whether considering other evidence, the jury came to an erroneous conclusion, cannot be argued on a writ of error; nor can the law as laid down by the Court in its charge to the jury be attacked when no exceptions were taken to the matter complained of; nor can matters not urged in the lower court be urged for the first time in the Appellate Court.

I.

THE ASSIGNMENTS OF ERROR CANNOT BE REVIEWED BECAUSE THE BILL OF EXCEPTIONS DOES NOT PURPORT TO CONTAIN ALL THE EVIDENCE.

The bill of exceptions in this case does not purport to contain all the evidence.

Therefore, no assignments of error relating to the admission or exclusion of evidence or to the instructions given and refused can be reviewed.

City of Milwaukee v. Shailer & Schniglau Co.,
91 Fed. 726.

Even though it was certified that the bill of exceptions contained all the material evidence, no assignment of error can be reviewed where, by reference made in the charge of the court, it appears that important testimony touching the points in controversy is omitted.

City of Milwaukee v. Shailer, 91 Fed. 726.

Where the bill of exceptions does not contain or purport to contain, all the evidence, an erroneous ruling in the admission of evidence cannot be held prejudicial on appeal.

Brown v. Casey, 80 Cal. 504.

Objections to admission or rejection of evidence cannot be considered unless the bill of exceptions states affirmatively that all the evidence is set out therein.

Taylor v. Boggs, 20 Ohio St. 516.

Porter v. Hall, 11 Kan. 514.

Where the rulings depended on the proof they will be presumed correct if the record does not purport to set out the whole evidence.

Morgan v. Morgan, 35 Ala. 303.

II.

ASSIGNMENT OF ERRORS CLASSIFIED.

Assuming, however, that the assignments of error can be considered at all we would call the attention of the Court to the fact that the various points sought to be made by the plaintiff in error are not set out in their logical sequence, but are scattered in various forms through the brief. We shall tabulate them, in answer, as follows:

1. The question of air-dried hops and the contract between the parties.

II. Questions relating to the proof of breach of contract.

III. Questions arising as to proof of amounts received on resale of hops, selling expenses, vouchers, books of account, etc.

IV. Sundry other assignments.

III.

AIR-DRIED HOPS, AND THE CONTRACT BETWEEN THE PARTIES.

Plaintiff in error devotes several pages in its brief to a discussion of whether the contract between the parties called for air-dried Cosumnes hops or not; and much space is devoted to the question of the Court erring in so defining the contract, and in confining the evidence to that subject. The answer to all this argument is:

1. *The matter is settled by the pleadings.*

The pleadings in this case admit that the contract between the plaintiff and defendant was for the sale and delivery of "Choice Cosumnes air-dried hops." The complaint as originally drawn stated in general terms that plaintiff agreed to sell and deliver two thousand bales of Cosumnes hops to be grown in the State of California for the year 1912. (Trans. page 1.)

Defendant in its answer denied that any contract was made as alleged in the complaint, but alleged the contract between the parties was that the plaintiff caused a telegram to be transmitted to the defendant, offering to sell one thousand bales of

“Choice Cosumnes air-dried hops;” that the defendant accepted said offer, and thereafter plaintiff transmitted another telegram to the defendant, offering to sell an additional one thousand bales of “Choice air- dried Cosumnes hops;” the defendant accepted the offer. (Trans. page 27.)

The plaintiff then amended its complaint, by leave of Court, to conform to the allegation contained in the answer, by adding the words: “choice air-dried” before the word “hops”. (Trans. page 4.)

Thus, by the pleadings of the parties, the article to be sold and delivered was “choice Cosumnes air-dried hops”, and the pages of the brief of the plaintiff in error devoted to the discussion of this subject are useless.

While the pleadings thus allege and admit that the contract was for the sale and delivery of two thousand bales of choice Cosumnes air-dried hops, the contract did not provide that the plaintiff below, Horst Company, “ should submit samples”, but inasmuch as samples were actually exchanged between the parties, the Court instructed the jury that ~~the~~ telegraphic offers by the plaintiff and their acceptance by the defendant constituted a binding contract whereby the plaintiff obligated itself to sell and deliver and the defendant obligated itself to accept and pay for two thousand bales of “choice air-dried Cosumnes hops”; and that this contract was in no respect modified or changed by the subsequent correspondence or negotiations of the parties. The Court, however, instructed the jury that, while the

contract did not by its terms require the plaintiff below to submit samples of hops prior to delivery, the evidence showed that the parties by their acts so construed the contract, and that this therefrom became one of the terms of the contract by which they were bound. (Trans. page 368.) No exception was taken to these instructions.

2. The Court in its charge instructed the jury that the contract called for the sale and delivery of "Choice air-dried Cosumnes hops." No exception was taken to this charge, and therefore the matter cannot be considered here. Both sides to the controversy accepted this as correct.

3. Even if the question was open to debate, an inspection of the telegrams which passed between the parties shows that the article contracted for was, as admitted by the pleadings and declared by the Court, "Choice Cosumnes air-dried hops."

4. While it is unnecessary to enter into a discussion as to the difference existing between air-dried hops and kiln-dried hops, it may be said that air-dried hops are dried by forced air. On the other hand, kiln-dried hops are dried in an entirely different manner. The heat is inside, and comes from a stove in the building; while, in the case of the air-dried hops, the air is warmed outside the building and blown into the place where the hops are placed for drying. There is a distinction in quality between the hops treated by the different processes, because the air-dried hops retain the oils and resins better than the kiln-dried hops. This is supposed to be an

advantage, as the air-dried hops are superior in brewing qualities to the kiln-dried, as being cured by a slower and different process, that preserves the chemical qualities of the hops, making them very desirable for brewing purposes. On the other hand, as kiln-dried hops are dried at a higher temperature and by a different process, a part of the desirable quality of the hops is destroyed. While after curing the difference may not be so apparent to the eye, yet the difference in the grading process is very material. (Trans. pages 57, 101.)

IV.

CONTRACT MADE BY TELEGRAMS.

The plaintiff in error also attacks the instructions of the Court that the contract was made by the telegrams passing between the parties in 1911.

In answer to this contention, in the first place, it may be said that no exception was taken to such instruction of the Court.

In its assignment of errors, the plaintiff in error seeks to raise this question for the first time, but no exception was taken to the instruction of the Court on this point when the instructions were given. (See Trans. page 380.)

Therefore it is waived.

In the second place the pleadings admit that the contract was made by the telegrams in 1911. (See page 27, Transcript.)

The point was not raised in the lower court that

the minds of the parties had not met prior to 1911. Plaintiff in error, in the court below, admitted that a binding contract was made in 1911 for the sale and delivery of two thousand bales of hops; but its contention was that this binding contract had been modified; but no question was raised as to the existence of the contract in 1911. The case was tried by both parties on the theory that such contract was made in 1911. The only contention of defendant was that afterwards it had been modified.

Even if it were a debatable question, the evidence shows that the contract was complete between the parties.

The court on appeal must confine its consideration of the case to the theory adopted by the trial court as disclosed by its instructions when there were no objections to the instructions or requests for any other instructions.

Sherman v. Mason, etc. Co., 147 N. Y. S. 609,
162 App. Div. 327.

In the Federal Courts, in actions at law, only questions presented to and determined by the trial court will be reviewed by an appellate court; and when a cause is tried upon an issue of theory presented by one of the parties in the trial court, that party will not be permitted in the appellate court to present a different issue or theory for its consideration.

Hatcher v. Northwestern Nat. Ins. Co., 184
Fed 23, 106 C. C. A. 225.

No question not presented and ruled on in the trial court can be used on appeal.

De Rodriguez v. Vironi, 201 W. S. 371, 50 L. Ed. 792.

In actions at law the function of the Circuit Court of Appeals is exclusively the correction of errors below, and questions which were not presented to nor decided by the trial court are not open for review.

Jonathan Clark & Sons, v. City of Pittsburgh, 146 Fed. 441; affirmed in 154 Fed. 464; 83 C. C. A. 262.

Where parties with the assent of the court unite in trying a case on the theory that a certain matter is within the issues, they cannot depart therefrom on appeal.

Missouri K. & T. Ry. Co., v. Wilhoit, 160 Fed. 440.

V.

QUESTIONS RELATING TO BREACH OF CONTRACT.

Under this head we shall consider such objections as are urged by the plaintiff in error on what may be considered the subject matter of breach of contract and proof that the defendant was not justified in refusing to accept the hops tendered by the plaintiff below.

1. *The repudiation of the contract by defendant below was premature.*

Defendant in its answer alleges that in September, 1911, the defendant below in writing informed the plaintiff below that its understanding of any contract between plaintiff and defendant in relation to the hops was that shipment and deliveries of the hops should be made by the plaintiff to defendant during the months of October, November and December of 1912, and January and February of 1913, and that samples of any hops which the plaintiff should offer for deliver to defendant, in pursuance of the telegraphic offers and acceptances, should be submitted by plaintiff to defendant and approved by defendant before shipments or delivery should be made; that the plaintiff below accepted and agreed to defendant's interpretation and understanding of the said telegraphic offers and acceptances, and thereafter, in the months of September and October, 1912, the plaintiff submitted and offered to defendant for its approval before shipment samples of hops which plaintiff claimed were choice Cosumnes hops of the crop of 1912; but the said samples were not choice Cosumnes hops, but were hops of far inferior quality, and defendant refused to approve the same. (Trans. pages 28-29.)

The defendant below thereby admits that the plaintiff below had until February, 1913, in which to make deliveries. Before the expiration of that time, on November 4th, 1912, the defendant below canceled the contract. (Trans. page 58.)

By the terms of the contract, as alleged in the answer, the plaintiff below had several months there-

after to make other tenders of hops pursuant to the contract.

2. In addition to this admission contained in the pleadings, the record shows testimony was introduced on behalf of the plaintiff below showing that where, in the sale of hops, no precise time is specified for delivery, it is understood by those dealing in the commodity that the seller or shipper has until the end of the shipping season in which to make delivery; that this season extends from the time of picking or harvesting until the first of March of the following year. There was a conflict of evidence on this subject, but the Court submitted the question to the jury in the following words:

“If you find that such custom or usage existed or was known to the parties when the contract was made, then, the contract being silent as to the date of delivery, plaintiff had until the end of said shipping season to deliver the hops specified in the contract.” (Trans. page 373.)

No exception was taken to this instruction.

3. Even if the pleadings were silent as to the time in which plaintiff had a right to deliver the hops, and even if there was no custom, then plaintiff was entitled to a reasonable time in which to make delivery; as, on this subject, the Court said: “Where the contract is made, as in the present instance, for future delivery of a commodity not yet grown or produced, and no time is specified for delivery, the law implies, ordinarily, that delivery shall be made within a reasonable time after the commodity has been prepared for market.”

No exception was taken to this instruction.

In any one of the three instances above, it is evident that the defendant below prematurely broke the contract, before the plaintiff had had a full opportunity to perform, and upon this assumption it would be immaterial whether the samples of hops submitted by the plaintiff below to the defendant below were of the quality required by the contract or not, as the defendant below could not cut the plaintiff below off from furnishing other samples.

This is similar to a case arising in the Sixth Circuit:

“Plaintiff contracted to deliver 1,000 bales of cotton, of specified grades and at specified prices, on or before October 15, 1905, to a carrier, according to shipping directions to be furnished by defendants; plaintiff to pay cost and freight to Liverpool. About October 3d the point of delivery was changed; plaintiff agreeing to deliver at its warehouses in Birmingham and Decatur, Ala. On October 4th defendants sent an agent to Birmingham to receive cotton to be tendered there, and he, after accepting 100 bales, refused to examine or accept more, because the cotton tendered was not equal in staple to the contract quality. The agent was requested to go to Decatur and examine cotton to be tendered there, but refused, and on October 7th defendants, claiming a violation of the contract, gave notice of cancellation and thereafter refused to accept any further tenders. *Held*, that plaintiff had until October 15th in which to tender cotton complying with the contract, and that defendants’ refusal to inspect and accept was premature, and entitled plaintiff to recover damage as for a breach of contract”.

McBath v. Jones Cotton Co., 149 Fed. 383.

Relative to the liability of the defendant for damages in rejecting the hops prematurely, the Court in the present case instructed the jury:

“From what I have said, you will understand that if the samples submitted by plaintiff did, as indicated, fairly represent the quality of hops called for in the contract, and that plaintiff was ready and able to deliver the required quantity within the time allowed him for that purpose, then defendant was not justified in attempting to cancel or repudiate its obligation to receive them, and the plaintiff will be entitled to recover the damages suffered by it through the defendant’s refusal to accept and pay for them. Whether plaintiff had the full quantity in one lot or amount or not would make no difference in that respect, if he could have procured them in time to make delivery within the terms of the contract; and with reference to the time within which such delivery was made, I shall hereafter more fully instruct you.”

“If, at the time of the receipt of the defendant’s telegram announcing that he canceled the contract, plaintiff was ready and able, as I have indicated, to comply with its terms, he is entitled to treat this refusal as a complete breach, which gave him the right, without further tender, of immediately commencing an action for damages.

“The rule of damages for breach of contract by renunciation of it before the date of performance of it arrives is the amount which the injured party suffers by the continued breach, or at any time performance is due, less any abatement by reason of steps by the injured party to protect himself which the law requires him to take. That is, if you find that the defendant was not justified in refusing to accept the hops in question, the plaintiff is entitled to such damages as would justly represent the amount of its

loss between the date of the repudiation of the contract and the time in which it had to make complete delivery of the hops, less the amount it could have saved by reasonably prompt disposition of the hops to others, at the best price to be obtained, as hereinafter stated, such damages not to exceed the amount demanded in the complaint—which, I believe, is \$32,000.00.” (Trans. pages 372-373.)

No exception was taken to this instruction.

If there was a premature repudiation of the contract on the part of the defendant below, plaintiff was at once entitled to its damages, and it was unnecessary to consider the quality of the samples of hops tendered by plaintiff below to defendant below, as the plaintiff would have all the time during which delivery would have been made to submit other samples or accumulate other hops. The premature repudiation of the contract could not cut off this right.

4. However, it was contended by the defendant below:

(a) That samples were necessary, and,

(b) That samples had been submitted by the defendant to the plaintiff which the defendant said were satisfactory to it, and plaintiff sent samples to meet these samples submitted by defendant.

The question was presented to the court and jury as one of fact whether these samples complied with the contract between the parties, or whether the samples offered by plaintiff were similar in quality to those which the defendant said it would accept. All the samples were before the Court and submitted to

the jury in evidence. Experts were also called for the purpose of passing their opinion as to the quality of these various samples. We understand now that plaintiff in error claims such expert testimony was not admissible, and that certain persons called as experts were not qualified as such.

As to the admissibility of expert testimony, no such point was raised in the court below. The very first witness called in the case was P. C. Drescher, who was called on behalf of the defendant out of order; he was called as an expert and gave his opinion as to the various samples. (Trans. page 80.) The defendant in the court below thus first brought in expert testimony, and the case was tried upon that theory.

Even if the question were a debatable one as to whether the subject was one admitting of expert testimony, there can be no question that expert testimony in the present cause was admissible.

Experts or those qualified by experience in a trade or occupation may testify as to:

Quality of cloth,

Peo v. Lorren, 119 Cal. 88;

Quality of gambier,

Littlejohn v. Shaw, 159 N. Y. 188, 53 N. E. 810;

Quality of lumber and fitness for given use,

Bigler v. New York, 6 Hun. 239;

Keeping quality of apples known to be merchantable at stated time,

Jones v. Emerson, 41 Wash. 33, 82 Pac. 1017;

Quality of wire rope,

Grunwald v. Freese, (Cal.) 34 Pac. 73;

Merchantable condition of raisins,

Hewes v. German Fruit Co., 106 Cal. 441;

Equality of printed matter to sample,

Sallwasser v. Hazlitt, 18 Ill. App. 243;

Quality and strength of iron in hoist hook,

Claxton's Admr. v. Lexington & B. S. R. Co.,
76 Ky. 636;

Merchantability of wheat,

Pacific Coast Elevator Co. v. Brarinder, 14
Wash. 315, 44 Pac. 544.

Even if a witness is not an expert in the usual sense he may testify in any matter connected with any trade or calling in which by reason of his experience he has particular skill.

Many cases are stated in "Cyc.," from which we quote the following:

"*Agriculture*. Persons engaged in agriculture may testify to facts generally known in the agricultural world, such as the proper time or method for conducting various farming operations, the average yield of given crops, what constitutes a proper fence, or definite probabilities in farming. They may state what acts are prudent under given circumstances, or the effect of certain forces in operations upon land.

“Cattle and Stock Raising and the Care and Use of Domestic Animals. Witnesses experienced in cattle raising may state facts generally known in the business. Thus, they may state facts with regard to their diseases, unsoundness or pedigree; the effects of a designated treatment or the usual method of butchering. Stock raisers may state facts familiar in their art. Persons familiar with the use of horses and other domestic animals may state relevant facts not generally known as to their habits or handling.

“Mechanics. Those persons who are skilled in mechanical matters are competent to testify as to relevant facts which are familiar in the mechanic arts. Such facts may be simple and involve little of the element of reasoning, as for example the action of natural laws, the limits of ordinary observation, the lightness or the tensile or other strength of materials or appliances, under what strain they are at a given time, or how their strength is affected by given imperfections; or the facts may be more complicated without losing their essential character as facts; as where the witness states the cause of observed phenomena, the dangers attendant upon the use of particular machinery, or the prosecution of certain lines of business; how injuries from these dangers can be prevented; how mechanic operations should be conducted; the physical effects of certain mechanical devices; the results of specific defects; and in general what certain appearances would indicate to an observer experienced or skilled in mechanical trades. He may even state a conclusion regarding the sufficiency of mechanical devices for certain purposes.”

I7 Cyc., 66, 71.

Hops when sold are a manufactured product, that is, the green hop is picked, cured and baled.

The principal questions arising as to the quality of hops relate to the picking and curing and their freedom from disease. All hops contain more or less leaves when sold commercially. They should not be cured too much or too little. They should not be picked when immature or over-mature.

A person who testifies as to the quality of a manufactured product is not an expert, strictly speaking, but he is one who is familiar with the process involved. "Those experienced in manufacturing pursuits may state facts within their knowledge concerning them; the disease-producing effects of certain manufacturing occupations; that certain lines of manufacturing usually classed as dangerous are safe under stated conditions; the proper method of doing certain manufacturing work; and the effect of acts not so recognized."

17 Cyc., 71.

The ruling on the question of qualification of an expert is one of discretion, and will not be overturned unless there is a want of evidence to support it or an abuse of discretion.

Vallejo & N. R. Co. v. Reed Orchard Co.,
..... Cal., 147 Pac. 238, 252.

VI.

AS TO THE TESTIMONY OF THE WITNESSES
CHALMERS AND TREGANZA CONCERNING
THEIR OBSERVATION AS TO THE MANNER
OF PICKING HOPS BY HORST COMPANY.

The plaintiff in error raises the point that the

Court erred in rejecting the testimony of Chalmers and Treganza. Their testimony was received on all relevant points, but it was sought to have some testimony introduced as to conversations of men whose names were not given, or undefined on the ranch, in no way connected with the Horst Company. The hops referred to had nothing to do with the hops tendered by the plaintiff to the defendant. This was clearly pointed out by the Court's rulings on pages 304-5 of the Transcript.

The testimony of Chambers, on pages 310-11 shows that the Court allowed him to testify to anything relevant to the case. Finally all objections were withdrawn to the testimony, as follows:

"Mr. Devlin: I will withdraw our objections that we made to that testimony; I will give them a full chance." (Trans. page 313.)

The plaintiff in error was given full opportunity to introduce all this irrelevant testimony, if it so desired, but did not avail itself of the opportunity.

Any objection to the testimony thus was waived.

Estate of Ross, 50 Cal. Dec. 304.

Kahn v. Trust-Rosenberg Cap Co., 139 Cal. 346;

Mitchell v. Davis, 23 Cal. 384.

The testimony was, however, clearly irrelevant to any issue in the case. It in no way was connected with the samples and was hearsay.

VII.

QUESTIONS ARISING AS TO PROOF AMOUNTS
RECEIVED ON RESALE OF HOPS, SELLING
EXPENSES, VOUCHERS, BOOK OF AC-
COUNTS, ETC.

Covering many pages of the brief of plaintiff in error are observations as to book entries. The objections as stated by the plaintiff in error are not borne out by the record.

This is not a case to recover for goods sold and delivered, in which the claim is proven by the introduction in evidence of the tradesmen's books.

It is a suit for damages arising from a breach of contract for the sale of hops.

The Court instructed the jury as to the proper measure of damages. It said:

"If the hops tendered by plaintiff were of the quality specified in the contract and defendant consequently not justified in refusing their delivery, plaintiff was not required to make further tender of them, but if it had such hops on hand it could proceed to sell them at the best market price obtainable at the time and place of delivery; if there was no market price at the time and place of delivery, then at the market price at the nearest market for such commodity, or if there was no existing market price then at the best price obtainable; and if this was less than the contract price plaintiff is entitled to recover the difference between that price and the amount realized by the sale plus any expenses reasonably incurred by plaintiff in excess of what it would have cost plaintiff to deliver the hops to defendant had the contract been completely performed. It is for the jury to decide what expenses, if any, thus claimed are, under

the circumstances, justly and reasonably incurred. While in this case, as I have indicated, plaintiff was required, under the law, upon a repudiation of the contract by the defendant, to proceed with due diligence and expedition to dispose of the hops to the best advantage it could, and thus reduce the damages resulting through defendant's breach. If you find there was a breach, he was only entitled to incur such expense in that regard as an ordinarily prudent person would have incurred such as for brokerage, insurance, storage, cartage and the like incidents. The mere fact that plaintiff may have paid out certain expenses in reselling the hops is not in itself sufficient to entitle him to recover the expenditure against the defendant unless the jury find that it was a reasonably just and proper one, which a man of ordinary business prudence would have considered necessary to incur for the purpose." (Trans. pp. 374-5.)

And again:

"If a contract for the sale of merchandise has been broken by the buyer, and the seller is compelled to resell at a loss, he is entitled to recover the difference between the contract price and the price that he has realized on a resale, together with his expenses exclusive of interest, interest on his demand not being claimed." (Trans. p. 375.)

These instructions were not excepted to in the court below nor challenged here, so we may assume, without citing cases, they correctly state the law.

Under these instructions plaintiff below showed:

1. The prices obtained on a resale;
2. The expenses of the resale;

These expenses under the instructions of the Court could not be allowed unless the jury found them necessary and reasonable.

Witness Horst testified as to the persons to whom the hops were resold and the prices realized on a resale. At first he did not have his books with him. Defendant below objected that the books were the best evidence. Counsel for the plaintiff then said the books could be brought into court, but it would take a great deal of time. The attorney for the defendant below said that he would prefer to examine the books in the ordinary way. (Trans. p. 75.)

The books were subsequently brought into court, exhaustively examined into and the material parts of them introduced in evidence.

In the meantime the witness testified that he was personally familiar with the several items constituting the resales. (Trans. p. 76.)

He then testified from his own knowledge without objections as to the sale of the hops to various parties. (Trans. pp. 76-77.)

When the books were produced in court the same testimony was given by the witness Lange who was the bookkeeper.

The defendant below (plaintiff in error) *itself* then introduced in evidence the entry of the sales made after the breach of the contract, constituting evidence to the same effect as that given by Horst based on his personal knowledge. (Trans. p. 267.)

Thus the resales, giving the dates, the persons to whom sold, the number of bales and the prices realized on resale, were shown by the testimony of Horst and also by the books which on this point were introduced by the defendant below itself.

It then became proper to show what the expenses of sale were and that the plaintiff below had done everything it could do to diminish the damages claimed against the defendant.

The expenses of sales were shown in the first place by witnesses who testified what would be a proper charge to resell the quantity of hops rejected by defendant.

Thus witness Flint testified:

“There is no place where hops are sold by auction. They are sold by contract and personal solicitation. It is not ordinary or customary to sell by auction. Hops are sold either by paying a commission or salary. You generally pay a commission of so much per pound, one cent, $1\frac{1}{2}$ cent, or two cents per pound.

“It would take some time in the condition of the market in 1912 to sell 2,000 bales of hops, because it was late in the season, and England would not take any more of our hops. It was difficult to sell a large quantity outside of the United States and it would have been very hard to sell them. You would have to force them upon some one. Make him a bargain price or something of that kind, in order to sell them. It would take a long time.” (Trans. p. 209.)

In addition to this evidence, the *exact facts* as to what the reselling expenses were, and the actual amount of money received were given.

The original vouchers for money paid out by the plaintiff below were brought into court. (Trans. pp. 163-177.)

The witness was then cross-examined as to these vouchers. (Trans. p. 184.)

It was testified that the corporation E. Clemens Horst Co. paid those expenses and these salaries based upon those statements. (Trans. p. 157.)

In addition to the original vouchers that were produced in court the witness made calculations based upon the books before him as to interest, storage, freight on tare, insurance, local freight. These calculations were introduced in evidence. There was no objection made to them except they should be connected with the 2,000 bales of hops sold to Pabst Company. (Trans. p. 203.)

The witness Lange was called to make certain calculations on certain vouchers and books before the court, and in evidence.

He testified that all the hops of the plaintiff below in the United States and Canada are insured under floating insurance and that such insurance covered all the hops no matter where they are in any warehouse, or in any of their warehouses on the ranches.

The books showing the sales of the hops—the quantity and dates—were introduced in evidence. (Trans. p. 267.)

The witness made a calculation as to what would be a proper proportion for insurance.

Defendant below made no objection to the witness thus testifying but moved to strike out the answer as not responsive. (Trans. p. 146.)

A previous objection was only to the effect that the testimony took for granted that there is evidence

and facts showing that 2,000 bales were set apart to the Pabst people. (Trans. p. 145.)

The witness then testified that he figured interest on losses. No objection was made to this question. This, however, is immaterial because the Court in its instruction to the jury declared plaintiff below was not entitled to interest.

The witness then testified without objection that there were various freight rates covering the sales, and that he figured the tare at five pounds per bale which is the usual trade custom and the freight on the tare is figured on the amount of pounds of tare at the freight rate under which the invoices were made out to the various person who bought the hops.

After the testimony was given without objection, defendant below moved to strike it out, but not on any ground that the books were not before the court, nor the best evidence, because the witness was giving his computations based on the books already introduced in evidence.

Witness also figured up the item of storage. There were other charges such as local freight, cartage, weighing, sampling and repairing, and other charges that the company had the vouchers to cover, and which were presented in court. They appeared on the books in the regular course of business. No objection was made as to the witness testifying from books or vouchers, but the objection was that it called for hearsay evidence as to what the charges were and that they were not connected with the 2,000 bales. (Trans. p. 148.)

The witness then testified without objection that there were discounts to brewers for cash payments and that it was the usual custom to discount for cash payments. Those actually appeared in the books. In the ledger under bad debts and uncollectible accounts appeared the sum of \$262.19, which was the difference between the amount of the invoices and the amount collected.

After the testimony was given the defendant below objected to any testimony as to losses. There was no objection to the witness testifying from books or vouchers. (Trans. p. 149.)

On this point we quote the remarks of the Court :

"If, by reason of a breach of the contract for the purchase of goods, the man left with those goods on hand, the law requires him to take all reasonable means with reasonable expedition, adopting, of course, only the ordinary methods of business, to dispose of those goods at the best figure that he can procure for them. That he owes to the one with whom he had the contract of sale, to protect him from damages as far as possible. In other words, you cannot, as I said yesterday, permit those goods to go to waste, and charge him with the whole loss. Now, if taking the usual and ordinary methods, and using all of the usual and ordinary precautions of business, he suffers a loss in the same way that a man does that carries on his business in the usual and ordinary way, he is entitled to that loss accruing on the goods which were left on his hands by reason of the breach of the contract, and in the nature of things he is entitled to recoup any loss using all due and reasonable diligence to make the most out of the goods that he can under the circumstances." (Trans. p. 150.)

All these charges the witness stated, were on the 2,000 bales (Trans. p. 150). The goods were sold in the regular course of business and the losses occurred through causes which the company could not avoid. (Trans. p. 151.)

Next, the witness testified that he had tabulated certain charges as a part of the overhead selling expense.

The Court sustained certain objections until the witness testified that the items appeared on the books of the company, that the usual and customary price per pound for selling hops was one and a half cents per pound, and that in lieu of that amount he was giving a portion of the overhead charge in the New York office for selling 1300 bales of hops. All the expenses of the San Francisco office were eliminated. He had examined the vouchers which he produced in court and which were turned over to his company for the expenses of selling those hops, and testified that he was familiar with the delivery of these hops to Eastern agents after November 4th, and until the last of what was called the Pabst hops were sold. He testified:

“I have charge of the stock room and the books, and I know the stock that goes out and where it goes to, and I know where the 2,000 bales of hops were sold, and that afterwards returns were made by our agents stating where they were sold and the prices that they obtained and I know the salaries that were paid to our salesmen from our books and I know the expenses that were incurred; and they related to the 2,000 bales of hops and the other hops. The corporation E. Clemens Horst Company paid

those expenses and those salaries based upon those statements. They were paid before this suit was commenced in the ordinary and usual course of business."

No objection was made as to the vouchers or books. The only objection was whether evidence could be given of the overhead expense as a part of the selling expense.

The witness testified without objection that the items of expenditures with reference to the business of this corporation transacted in New York or in any other place in the East, are sent on here and entered in its books here in San Francisco in the regular and orderly course of business. The reports come daily and weekly. A slip is made out by each salesman every day but they do not always send them. (Trans. pp. 157-8.)

The Court said in ruling:

"Under these circumstances I think it is perfectly competent. The nature of the business transactions of this corporation involve certain overhead charges as they are called. There is charge for regular salaries and for the expenses of transacting the business. Now, that business was, and the witness is competent to testify of a certain volume, and making up a part of that volume was the disposition of this 1346 bales of hops which it is claimed here was disposed of on a broken contract with the Pabst Company. Now, they propose, and I think they are correct, to ask for if they are entitled to damages. If the jury finds they are entitled to damages the proportionate amount of the overhead charge which would apply to transactions involved in disposing of the 1346 bales of hops returned to them. I think they are entitled to it, if the jury

finds that they are entitled to recover at all.” (Trans. p. 159.)

The statements referred to by the witness which was based upon the original vouchers, are set out in the transcript. ((pp. 163-172.)

The original vouchers were produced which the witness testified had been paid, but as they are very numerous the transcript contains certain samples as illustrative of the whole. (Trans. pp. 173-179.)

The witness then testified without objection what the proportionate share of the overhead would be, showing that it was less than the usual commission of 11½ cents per bale for selling. (Trans. p 179.)

On cross-examination the witness was examined concerning the vouchers which he produced in court. The defendant's counsel took up the various original vouchers and asked in detail concerning them as for instance where he asks, “Will you turn to some of those vouchers and give us one or two more of the items, that we will know the character of the items that are included in this? I show you an item dated November 12th, 1912. What does that refer to?” (Trans. p. 191.)

The witness gave to defendant's counsel a copy of the list for storage. (Trans. p. 201.)

The defendant in error then offered in evidence the calculations of the witness as to interest, storage, freight on tare, insurance and local freight.

No objection was made to their reception in evidence, save that they should be connected with the 2,000 bales of hops that were specially set aside as

and for the Pabst shipment after some definite time so that there will be some means of knowing that they were properly charged against Pabst. (Trans. p. 207.)

No objection not made in the court below can be made here. Even if specific objection had been made it was proper for the witness to state from his own knowledge the salaries paid and from his examination of original vouchers, produced in court and subject to examination, what the result was.

The books were filed in court. The witness Farrell, called on behalf of the plaintiff in error, testified that he had examined the sales book of the plaintiff (defendant in error) on file here and checked up the sales. (Trans. p. 365.)

Both parties read entries from the book and the same went into evidence.

To entitle a party to review a ruling overruling objections to the admission of evidence, the grounds of such objections must have been stated.

Thomas China Co. v. C. W. Raymond Co., 135 Fed. 25, 67 C. C. A. 629.

An assignment of error not supported by an exception cannot be reviewed.

Nethersland American Steam Nav. Co. v. Diamond, 128 Fed. 570, 63 C. C. A. 212.

It is indispensable to review in an appellate court of a ruling of the court below on the admissibility of evidence that it should have been challenged by an exception.

Potter v. United States, 122 Fed. 49, 58 C. C. A. 231.

A general objection to a question asked a witness as "immaterial, incompetent and irrelevant" is insufficient to sustain an assignment of error.

Shandrew v. St. P. M. & C. Ry. Co., 142 Fed. 320, 73 C. C. A. 430.

Where no objection is made or exception taken to the evidence introduced by the opposite party, and no ruling therein is invoked or made there can be no error for review.

Randle v. Barnard, 99 Fed. 348, affirmed 110 Fed. 906, 49 C. C. A. 177.

Objection to questions propounded to witnesses not brought to the attention of the lower court and its opinion taken thereon, cannot be reviewed.

Eli Mining Co. v. Carleton, 108 Fed. 24, 47 C. C. A. 166.

An objection to evidence is waived where it does not give fair notice of its grounds, which could have been obviated by opposing counsel had he understood the objection.

Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 131 C. C. A. 504.

"Moreover, the objection which has been considered was never called to the attention of the court below or ruled by it, and an appellate court cannot declare that the trial court erred

in a ruling that it has never made upon a question never presented to it."

Ottumwa Co. v. Christy Co., 215 Fed. 362, 131 C. C. A. 504.

In a case arising in the eighth circuit, the Court said:

"Another specification of error is that a witness was permitted to testify, over the objection that his testimony was incompetent and immaterial, to a statement which he had prepared from the books of account in evidence of the amounts which, according to those books, had been received and paid out in the office of which Kelly had charge, between April 24, 1895, and April 2, 1898. The objection now urged is that the computation covered 33 days prior to the commencement of the term of the bond, and it is contended that the ruling is erroneous on that ground. But the general objection that the testimony was incompetent and immaterial did not fairly apprise the court or the counsel of this reason for the rejection of the evidence. A general objection of this character is undoubtedly sufficient when the ground upon which it is founded is discernible. But when the reason for the rejection is not perceptible, it is the duty of the counsel who relies upon it to clearly call the attention of the court to the ground of the objection. Otherwise the general objection serves rather to conceal than to present the real reason for the rejection of the evidence. A general objection which has this effect must be disregarded in the appellate court. It cannot be permitted to form the basis for a reversal of a judgment when the reason for the objection was not called to the attention of the court and counsel at the trial."

Guarantee Co. of North America v. Phoenix Ins. Co., 124 Fed. 175, 59 C. C. A. 376, 381.

The evidence as to the expenses of a resale of the rejected hops was proper.

In the first place such evidence was admissible to show the facts as to what the rejected hops actually realized. This evidence consisted on one hand of what the plaintiff actually received and on the other of what it paid out.

This case is to recover damages for a breach of contract. The plaintiff was compelled to sell the hops for the best prices reasonably obtainable in the nearest available market, and was entitled to a reasonable selling expense.

As there was no segregation of the hops ,the plaintiff showed the expense of selling all the hops that it had on hand. It did not include the expenses of its San Francisco office and the defendant was given the benefit of these free from any claim. It showed to a certainty what cost it went to for storage, insurance, interest, etc. This left the only item its selling expense. As testified to by witnesses, the hops could not all be sold in San Francisco. In order to sell these hops in the East, it was necessary to have a selling force. The expense of this selling force was shown by the vouchers themselves paid out by the plaintiff below in the usual and ordinary course of business. When the vouchers were produced the books became superfluous because the books contained only the amounts stated in the vouchers which were the original evidence.

Witness Horst testified that there was no nearest available market. "You have got to sell them wherever you can sell them, wherever you can sell them." (Trans. p. 239.)

It was admitted in the court below that the plaintiff below was entitled to its reasonable expense in selling the Pabst hops, provided Pabst was in default.

When the original vouchers were produced, the only question was were they paid, and it was proper to show what expenses Horst Company had been put to in selling a quantity of hops in which was included without segregation the hops rejected by Pabst. That Horst Company had actually paid out the money represented by the vouchers was proven by independent witnesses. That these expenses constituted a gross sum for the sale of the Pabst hops and other hops sold at the same time was proven. It was testified that the expenses represented by the vouchers all related to the sale of hops in the East and that they were sold as quickly and cheaply as possible.

The purpose of the testimony was to show the prices actually realized by the plaintiff below and the expenses actually paid. If such expenses were actually paid they must be deemed reasonable. But whether this be so or not, the jury were told that they were the judges whether they were reasonable. No claim is made that the plaintiff received more money for the hops than testified, or that the money represented by the vouchers was not actually paid out.

In a case where a breach of sale has occurred and the plaintiff is selling for defendant's account, he may be allowed a reasonable amount for his selling expenses, and when he has sold his own goods and those in trust for defendant, the jury certainly may *hear* what his expenses were.

No objection was made to the charge of the jury in the case before this court giving the law relative to the measure of damages. No instruction was asked by plaintiff in error as to the rule of damages. The evidence was admissible for the purpose of showing selling expenses on the question of the measure of damages, but whether it was or not, it certainly was admissible on the question of how much the plaintiff actually below received and paid out or claimed to pay out.

Evidence admissible for any purpose is properly admitted over a general objection.

Parks v. Giffith & Boyd Co., 91 Atl. 581, 123 Md. 233.

A general objection that evidence is not admissible at all should not be sustained, where it is material and admissible for any purpose.

Commonwealth Bonding & Casualty Co. v. Hendricks, 168 S. W. 1007.

Where evidence is admissible for a particular purpose, defendant cannot upon mere general exception place the Court in error for receiving it.

Barfield v. Evans, 65 So. 928.

Most of the evidence was given without objection or exception.

In the Federal courts an exception, taken immediately on a ruling being made, is indispensable to a review of the ruling by an appellate court.

Chicago, B. & Q. Ry. Co. v. Frye-Bruhn Co.,
184 F. 15, 106 C. C. A. 217.

A ruling to which no exception was taken cannot be reviewed on a writ of error.

Skeele Coal Co. v. Arnold, 200 F. 393.

An exception to the charge of the Court, or its refusal to charge, is indispensable to review.

Mexico International Land Co. v. Larkin, 195
F. 495, 115 C. C. A. 405.

Where no exception was taken to the Court's charge, errors thereon are not available on writ of error.

Gering v. Leyda, 186 F. 110, 108 C. C. A. 222.

An appellate court of the United States cannot weigh the evidence to determine whether or not it is sufficient to sustain a verdict.

Toledo, St. L. & W. R. Co. v. Howe, 191 F. 776,
112 C. C. A. 262.

In the Federal courts questions of fact, determined by the jury, properly instructed, are not reviewable.

Transit Development Co. v. Cheatham Electric Switching Device Co., 194 F. 936, 114 C. C. A. 599.

A judgment will not be reversed because of the admission of incompetent or irrelevant evidence unless it fairly appears to have been prejudicial.

Post. Pub. Co. v. Peck, 199 F. 6.

In an action on an implied agreement to pay rent, where defendant was a tenant by sufferance, the admission in evidence of a conversation between defendant and an agent of plaintiff in regard to the amount of rent to be paid, which did not result in an agreement, even if error, was without prejudice to defendant.

United States v. Whipple Hardware Co., 191 F. 945, 112 C. C. A. 357.

The admission of incompetent evidence is not prejudicial, where it added nothing of moment to the evidence already introduced on the same subject.

Wilhite v. Houston, 200 F. 390.

Where plaintiff, a switchman, alleged injury because of the use of a road tender on a switch engine, and it appeared that on the night of the injury the road tender had been placed on the switch engine in an emergency only, evidence that the tender was put out of commission the same night after the injury, and her number painted over, was not prejudicial to defendant.

Atlantic Coast Line R. Co. v. Linstedt, 184 F. 36, 106 C. C. A. 238.

In an action for injuries, the complaint alleged that by reason of the injuries plaintiff had lost the use of the muscles of his left leg, had lost a great deal of feeling, and that he could not properly control his left foot, plaintiff's physician testified that there was some swelling in the limb extending to the foot and ankle; that there had been a sore on the heel which would not heal, apparently made from pressure; and that it might have been by direct injury or have resulted from pressure. *Held*, that defendant was not prejudiced by the court's permitting plaintiff to testify over objection that he had a sore on his heel, that suppurated at times, which was nearly half an inch deep, and to exhibit his foot to the jury, though the testimony was not strictly relevant under the allegations and complaint.

(*C. C. A., 1911*) *Katalla Co. v. Rones*, 186 F. 30, 108 C. C. A. 132, affirming judgment (*C. C., 1910*) *Rones v. Katalla Co.*, 182 F. 946.

VIII.

THE ITEMS OF SELLING EXPENSE.

For the purpose of showing damages the plaintiff proved:

1. *The amount actually received* on a resale, as evidence of difference in value.

This was proven by Horst who testified from

personal knowledge and also by the plaintiff in error in introducing the books in evidence. (Page 267.)

2. *The difference between the price* which the seller could have obtained therefor in the market nearest to the place at which the hops should have been accepted by the buyer and at such time after the breach as would have sufficed with reasonable diligence for the seller to effect a resale.

Civil Code, Sec. 3353.

The market price for hops that prevailed after the repudiation of the contract, was testified to by witnesses. (Trans. p. 79 and p. 213.)

3. *The selling expenses.* These expenses consisted of:

(a) Storage, \$153.50 (Trans. p. 201).

(b) Insurance, \$25.98 (Trans. p. 204).

(c) Freight on tare, \$188.43 (Trans. pp. 204-5).

(d) Interest, \$310.73 (Trans. pp. 206-7).

(e) Proportionate share of overhead expenses, \$4,459.30 (Trans. p. 179).

(f) Uncollectible accounts or bad debts, being the difference between the amount of the invoices and the amount collected, \$262.19 (Trans. p. 149).

The interest charge in the instructions of the Court was eliminated. The Court also limited the expenses to brokerage, insurance, storage, cartage and the like incidents and told the jury, "The mere fact that plaintiff may have paid out certain expenses in reselling the hops is not in itself sufficient to entitle him to recover the expenditure against the

defendant, unless the jury find that it was a reasonably just and proper one which a man of ordinary business prudence would have considered necessary to incur for the purpose." (Trans. pp. 374-5.)

No exception was taken to this instruction.

The whole matter thus under proper instructions was left to the jury.

That the seller is entitled to recover his selling expenses is undoubted.

The measure of damages upon a resale of the goods is the difference between the contract price of the goods and the price which they produced at the resale if fairly made after deducting therefrom the expenses of the vendor in caring for the goods and selling them.

Winson v. Gregory, 2 Cal. App. 313.

The seller has the right to resell the goods and charge the vendee with the difference between the contract price and that realized at the sale.

Morris v. Webaugh, 43 N. E. 842.

In case of breach of contracts of sale the plaintiff is entitled to be made whole.

In a charge to a jury United States Circuit Judge Putnam said:

"The plaintiff is entitled as damages to a sum equal to the value of the contract to the plaintiff; in other words what would have been made from it, if defendant had performed it."

Rantoul v. Claremont Paper Co., 196 Fed. 307.

In that case the Court held that where defendant violated a contract to manufacture for plaintiff at specified prices, defendant refusing to receive the pulp or manufacture the paper, the Court properly charged that the jury might deduct from the estimates of plaintiff's loss a sum representing the proportionate cost of doing the business, or on account of probable loss of accounts, insurance accounts and selling expense.

The instruction given by the Court was:

"You should deduct from the plaintiff's claim, if you get to damages, such sum as you find it would have cost to have done the business, including probable loss of accounts and customers bills, interest on account and selling expenses."

Said the Court:

"As it must be assumed that all these matters were inherent in transacting the business and yet could not be specifically estimated or proved, it was within the province of the jury to make a reasonable deduction in reference thereto. It follows that this instruction was generally correct, and a general exception to it cannot lie. If erroneous in any particular, the particular should have been pointed out and the facts appertaining thereto made to appear in the record."

Rantoul v. Claremont Paper Co., supra.

In that case, even where the selling expense had not been incurred, bad debts had not been lost, etc., the Court held the jury could estimate these items in fixing the plaintiff's profits.

Expenses of resale by auction held properly included.

Whitney v. Boardman, 118 Mass. 242, 248.

Expenses proper item also that sale must be according to usual mode in the trade, *i. e.*, through brokers in the instant case rather than by auction.

Pollen v. Le Roy, 30 N. Y. 549, 557.

Expenses of sale and interest to be taken into consideration.

Hardwick v. American Can Co., 113 Tenn. 657, 88 S. W. 797;

Pope v. Filley, 9 Fed. 65.

Expenses to be added to amount lost on resale.

American Hide & Leather Co. v. Chalkley,
..... Va., 44 S. E. 705, 706.

The only items objected to are:

1. Overhead expense;
2. What plaintiff in error calls bad debts or the difference between the invoice of sales and the amount actually received.

We claim that under the instructions of the Court these were proper matter for the jury to *consider*. The Court did not tell the jury to allow them, but even if it did it would be perfectly proper, and as we have pointed out no exception was taken to the charge.

As to the overhead expense, there can be no question but that if the plaintiff below had employed brokers to sell the hops, it would be entitled to recover the amount it paid the brokers for that purpose, if such was the usual amount charged by brok-

ers. But as the plaintiff below had its own selling force, it did not employ brokers but sold through its own selling agents in the East and proportioned that cost to the whole cost of selling the hops rejected by defendant below with other hops.

This was highly favorable to the defaulting buyer (defendant below).

Figuring the broker's charges at $1\frac{1}{2}\text{c}$ a pound,—the usual commission—the commission would be \$5700.00. (Trans. p. 179.)

The proportionate share of overhead expense was \$4,459.30.

This gave the defendant below the best of it to the extent of \$1,240.70. (Trans. p. 179.)

Even if there was any error in admitting evidence as to overhead expense, it was cured by the other evidence that the reasonable cost of selling by the payment of a broker's commission, exceeded the amount shown as proportionate share of overhead expense (Testimony of Horst, p. 118; testimony of Lange, p. 179).

Hinckley v. Pittsburgh Steel Co., 121 U. S. 261, 30 L. Ed. 967, 971.

As to the so-called bad debts. Plaintiff below sold in the usual and ordinary manner and tried to realize the best results from the resale and sold hops to some brewers from which it did not receive payment.

It is to be remembered that the Court told the jury not to allow any selling expense it thought was

not reasonable. The propriety of the various elements of expense as testified to, was a question for the consideration of the jury, rather than for the Court in passing upon the admissibility of the evidence.

Evidence that the seller notified the buyer, upon his refusal to consummate the agreement of purchase, that he would sell the property to some one else for what he could get for it and hold him responsible for the difference, and that he advertised it and sold it for a certain price, which was the highest price he could get, is competent as tending to show the amount of damages actually resulting from the breach of the contract.

Gibbs v. Ranard, 86 Cal. 531.

The measure of damages, in cases such as the one at bar, is the one fixed in the Civil Code of California, as follows:

“In estimating damages, the value of the property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract, as would have sufficed, with reasonable diligence, for the seller to effect a re-sale.”

Civil Code, Cal., Sec. 3353.

While in such a case the seller may show what he received on a resale, where the purchaser has refused to accept the property, still the amount received at the sale is not conclusive evidence of value by which to measure the damages for which such buyer is liable.

Meyer v. McAllister, 24 Cal. App. 16.

The plaintiff below proved by Horst and others the difference in value, in accordance with the above section of the Code and the instruction of the Court. The amount obtained on a resale was evidence, but not conclusive, and the damages were satisfactorily proven by the method laid down in the Code.

The plaintiff in error entirely misconceives the rule of damages applicable to a case like the present one. In favor of the seller the measure of damages is *the difference in value to the seller* between the contract price and the price which he could have obtained for it in the market place at which it should have been accepted by the buyer.

Civil Code, Cal., Sec. 3353.

The seller is not compelled to sell the property at all. He may retain the property and recover the difference in value.

Plaintiff below introduced evidence showing this difference in value, and this difference constituted his damages. ~~It~~

Horst testified (p.79) The price in February ran from 14 to 16½ cents. Flint testified (p.213). The price was about 14¢. The difference between this price and the contract price constituted plaintiff's damages.

paid out, and, in case he performs services in selling, what the reasonable value of such services is. Evidence of this character is not conclusive, but it is

admissible as tending to show *difference in value* within the meaning of the Code.

Even if the property had been pledged for a debt and the pledgee had sold to satisfy the debt, and he sold in the usual and customary manner, he would be entitled to all reasonable expenses in and about selling the property, including the services of brokers, if hired by him, or if he had a selling force, the reasonable value of their services, or if they sold other goods with those pledged, a proportionate part of the selling expense.

The court instructed the jury in accordance with the rule of damages laid down in section 3353 of the Civil Code of California, and no exception was taken to the instruction.

We claim that none of these matters are reviewable on the record as presented.

If, however, the Court should be of the opinion that the matter is reviewable here, and also of the opinion that loss on bad accounts or any other item was erroneously considered, the extent to which the jury might have been affected can be exactly determined as being the amount of such item. The cause for that reason will not be reversed, but the defendant in error will be allowed to remit that portion of the judgment which may be, on condition of such remission, affirmed.

Thus, where the trial court has erroneously instructed the jury as to the measure of damage in a certain particular, and it is apparent that the erroneous assessment under the instruction could not

have exceeded a given sum, the appellate court will affirm the judgment on condition that plaintiff remit such excess.

Hazard Powder Co. v. Volger, 58 Fed. 152.

The Supreme Court of the United States held, "In this case the only error being in the allowance of interest, the court orders the judgment to be affirmed if the interest be remitted; otherwise to be reversed for that error."

Washington v. Harmon, 147 U. S. 571;

See also

Hansen v. Boyd, 161 U. S. 397.

IX.

OTHER ALLEGED ERRORS.

1. *Testimony in rebuttal.*

Plaintiff in error contends that it was error to allow witness Horst to testify in rebuttal. This is so much a matter of discretion with the court below that it is useless to argue it.

The admission in rebuttal of testimony which is not strictly rebuttal, but which should have been introduced in chief is within the discretion of the court.

Eric R. Co. v. Kennedy, 191 Fed. 332, 112 C. C. A. 76.

2. *Limiting cross-examination.*

The court below when it believes that the cross-

examination of a subject has been exhausted or is becoming unduly tedious and protracted may limit the cross-examination in its discretion. This case involving a simple issue of fact occupied nine court days, (Trans. p. 44), most of which was consumed by defendant's cross-examination. Surely it had ample time.

3. *Defendant's counter-claim.*

On page 131 of brief of plaintiff in error a few lines are confined to its counter-claim. Counsel say that the ruling of the court confining the testimony to "air-dried hops" destroyed its opportunity to establish its counter-claim. As we have heretofore pointed out, the quality of the hops as "air-dried" hops was fixed by the pleadings. For the reasons advanced by counsel for plaintiff in error as well as those given by the court, (Trans. p. 381), the instruction as to the counter-claim was proper.

4. *As to plaintiff below having hops on hand.*

Whether the plaintiff below had sufficient hops on hand to meet the contract, if the defendant below had not repudiated it, was a question of fact to be passed upon by the jury.

Witness Lange testified that there were 3062 bales of Cosumnes hops on hand in November, 1912. (Date of repudiation of contract.) (Trans. p. 180.)

To similar effect was the testimony of Horst. (Trans. p. 365.)

The account of sales introduced in evidence shows the number of bales of Cosumnes hops on hand

November 4, 1912, and to whom sold, (Trans. p. 267), showing an excess of 2000 bales.

Even if Horst had no hops on hand at all, he had the right to procure the hops and apply them on the contract.

4. *Proposed Instruction No. 3.* Plaintiff in error requested an instruction, the material parts of which had already been given by the court. The only new part requested was that the correspondence had changed the original contract by providing that plaintiff below should supply hops according to certain samples furnished by defendant below. The correspondence shows that there was no modification of the contract.

If, however, any argument was needed to show that such instruction should not have been given, it is afforded by the brief of the plaintiff in error (pages 126-131). In the brief it is contended that all questions arising as to whether the contract was changed by the acts of the parties were for the jury to decide under proper instructions, and the plaintiff in error claims that it tried the case upon the theory that the jury was to find whether the contract was modified.

Yet the instructions proposed did not leave the jury to find whether the contract was modified or not, but was positive in its terms that the contract had been modified.

If the plaintiff in error correctly states abstract principles of law, then in addition to the other reasons given, the instruction was properly refused.

DAMAGES AND COSTS ON AFFIRMANCE.

We ask in this case for an affirmance of the judgment and for damages and costs.

The judgment in this case was rendered on April 29th, 1914. During all of this time plaintiff has been kept out of its money.

No question presented by the plaintiff in error is, for the reasons pointed out, reviewable. A large portion of the brief of plaintiff in error is devoted to a discussion of the testimony. As the only question before the jury was one of fact, and as the contract was in writing, and its repudiation admitted, and as no exceptions on any material point were taken to the charge of the jury, and as no error committed by a jury in finding the amount of damages can be reviewed on a writ of error, the only effect of the writ of error in this case has been to cause the defendant in error long and unnecessary delay in collecting its judgment.

As held by the Supreme Court:

“On a writ of error, this court cannot review any error committed by a jury in finding the amount of damages; nor take cognizance of a complaint that a motion for a new trial was overruled; or that the verdict of the jury was contrary to law and not warranted by the testimony”,

and the Court holding that the writ of error was sued out merely for delay, awarded ten per cent

damages on the amount of the judgment, in addition to interest.

Wilson v. Everett, 139 U. S. 616.

See also

Armory v. Armory, 139 U. S. 616;
Rev. Stats. U. S., Sec. 1010.

We believe that the plaintiff in case of a broken contract should be made whole so far as it is in the power of the Court to do so. The payment of interest on the judgment falls far short of doing this.

Respectfully submitted,

DEVLIN & DEVLIN,
W. H. CARLIN,
MAURICE E. HARRISON,
Attorneys for Defendant in Error.

Nov. 4, 1915.